# No. 18,257

In the

# United States Court of Appeals

*For the Ninth Circuit*

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RAYTHEON COMPANY, a corporation,
*Appellant and Cross-appellee,*
vs.
RHEEM MANUFACTURING COMPANY, a corporation, and RHEEM SEMICONDUCTOR CORPORATION, a corporation,
*Appellees and Cross-appellants.*

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## Petition of Appellees for Rehearing

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FILED
SEP 19 1963
FRANK H. SCHMID, CLERK

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## Petition of Appellees for Rehearing

Appellees respectfully petition for a rehearing on the following grounds.

I.

### THE DECISION THAT MANUFACTURING'S OFFER WAS NOT "BONA FIDE" RESTS ON AN ASSUMPTION ABOUT THE MEANING OF THE CONTRACT CONTRARY TO THE TRIAL COURT'S INTERPRETATION FULLY SUPPORTED BY EXTRINSIC EVIDENCE

Basic to the decision (Op. 9, 12, 14) is the holding that, while Manufacturing had a right under the contract to make an offer, it could not do so if the purpose or effect was to "deprive Raytheon of its purchase rights". But this idea rests on an assumption of what rights the contract gave Raytheon that (a) *begs the question.* and (b) *sub silentio* assumes an answer to the second issue of the

case which, when it came to it, the Court has held that it may not decide at all.

The assumption reads into the contract a proviso that Raytheon had a right to purchase assets at distress value—i.e., at a price giving *no* consideration to the value to Raytheon but determined on the basis that Raytheon had decided not to buy, had eliminated itself from the group of possible buyers, and had ripped the items from the plant and placed them on the loading dock for removal.

The contract does *not* expressly so provide,[1] and from its words alone it would be *at least* as logical to say that Raytheon's right was subordinate to Manufacturing's right to offer, rather than the reverse, particularly since (a) one's rights under a contract are not derived from any isolated clause, and (b) Raytheon's right to buy at an appraised price arose only *if* no offer from another had been received.[2] Moreover, *at best,* Raytheon had no right to buy for less than "fair market value" as the parties *intended* that term. Thus, in *two* respects, the problem is one of contract interpretation. Under California law,[3] the contract must be construed in the setting of its extrinsic evidence,[4] and the interpretation is an issue of fact,[5] being a process of factual inference, wherein an appellate court may not supplant a trial court's interpretation by inferences which seem to it more probable,[6] particularly where to do so is to "find a more sinister cast [here bad faith] to actions

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1. The only reference to loading dock is in the clause (¶ 5) providing what should be done at the termination of the lease with respect to such of the items as Raytheon did not want (R. 54).

2. The lease does not even reach its provisions about an option to buy at an appraised price until after it states the "first refusal provision", and the whole clause (¶ 12, R. 57) is entitled "Right of First Refusal".

3. Which controls under the *Erie* doctrine, *Transcontinental Air v. Koppal,* 345 U.S. 653, 656.

4. *Union Oil Co. v. Union Sugar Co.,* 31 C.2d 300, 305-306.

5. *Barham v. Barham,* 33 C.2d 416.

6. *Estate of Bristol,* 23 C.2d 221, 223; *Estate of Rule,* 25 C.2d 1, 11; *Walling v. General Industries Co.,* 330 U.S. 545, 550; *Quon v. Niagara Fire Ins. Co., of New York,* 190 F.2d 257 (9 Cir.).

which the District Court apparently deemed innocent", *United States v. Real Estate Boards,* 339 U.S. 485, 495.

On the first of the two aspects of interpretation, extrinsic evidence sustains the Trial Court's inference that Semiconductor's purpose in seeking the contract right for its parent to make an offer was to protect it against any effort of Raytheon to pick up the items at junk value and that Raytheon acquiesced in that protective clause since it had denied any such intention.[7]

On the second aspect of interpretation, Ellison's testimony sustains the Trial Court's finding that Manufacturing's offer was in the amount of "fair market value" as found by Ellison (Finding 15, R. 160; R. Tr. 628). This Court could come to a contrary view *only* on an *assumption* that the "fair market value" at which Raytheon might buy was dismounted, distress value, determined *as if* Raytheon had already rejected the items,—only *by rejecting* Ellison's opinion that "fair market value" required consideration of elements of value to Raytheon itself.

This Court postulates that Ellison made a first appraisal of "fair market value" in the range of $400,000 to $500,000, that Manufacturing "discarded" this, and obtained from him another, 34% higher than what Ellison deemed "fair market value". But Ellison's testimony is that he made but *one* appraisal, his different sets of figures representing *different* things. He flatly said that $531,584 was his appraisal of "fair market value" and that his lower range was *not,* but represented only an "on dock" figure of a used equipment dealer.[8] If, as the Court apparently thought, other parts of Ellison's testimony support a different view of his meaning, it is elementary that the internal reconcilia-

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7. Some of many items of such evidence (Our Br. 5, 6, 23, 67): (a) From the outset Semiconductor rejected Raytheon's offer of 30% of book value; yet the figures of $298,674 and $396,142 mentioned in the Opinion are in this 30% range. (b) Semiconductor had heard and Raytheon denied a rumor that Raytheon intended to "rook" it. (c) In the negotiations Raytheon stated it did not doubt that the items were worth *book value* if Raytheon needed them. (d) As Raytheon knew, the items were worth to it every cent of Manufacturing's offer.

8. R. Tr. 271: 21-272:9; 277:9-20; 299:9; 308:1-9; 309-310. Indeed, the higher figure was his response to request for an amount he should be prepared to pay himself (R. Tr. 298: 15-20).

tion of a witness's testimony is peculiarly the task of the trial court. Moreover, irrespective of Ellison's testimony, the testimony of Stroup—the man who sought and received Ellison's appraisal—is binding in this Court. *Nuelson v. Sorensen*, 293 F.2d 454, 460 (9 Cir.). He leaves no doubt that he acted on but one appraisal and that the offer was the amount he understood was Ellison's view of "fair market value" (R. Tr. 491:17-18; 492:18-493:20; 497:1-10; 498:22-499:20; 511:21-512:14).

The equipment was largely specialized items which had been installed at large cost by carefully engineered techniques. The contract provided (¶ 13, R. 58) that if Raytheon elected to purchase, it would acquire the items "in their then condition and their then location". The extrinsic evidence supports the Trial Court's interpretation that in determining "fair market value" at which Raytheon could buy, the parties *had in mind* the assets "in place" and not dismantled "on dock" (See our Brief, pp. 56-58).

## II

## ON THE QUESTION WHETHER THE MEANING OF THE TERM "FAIR MARKET VALUE" WAS FOR COURT OR APPRAISER

We have had no opportunity to brief this question because *all* the parties assumed that the meaning of the term was for court, not appraiser, and mutually submitted it to this and the lower court. If permitted, we can brief the question in less than 10 pages.[9]

1. Even where parties have agreed that an issue be non-judicially determined, the right to withhold that issue from the court disappears "by seeking without reservation a judicial determination of the issue," *Trubowitch v. Riverbank Canning Co.*, 30 C.2d 335, 339, *Local 659, etc. v. Color Corp.*, 47 C.2d 189, whether on principles of waiver, executed oral modification of the agreement (Cal. Civ. Code § 1698), or mutual rescission (Civil Code § 1689(a)).[10]

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9. Rule 23 precludes us from doing so in this petition.

10. Just so, the parties waived a general arbitration clause (Art. VI(2), R. 40) otherwise applicable to the issue of *bona fides* of Manufacturing's offer.

2. The provision for Raytheon to pay "fair market value" to be assessed by an appraiser stated the standard for him to follow. *Two* tasks are involved: not only to find the dollars and cents—a task peculiarly within an appraiser's expertise—but to determine what standard the parties meant by their words, a task peculiarly within the expertise of courts. *If* the contract assigned *both* tasks to an appraiser, the authorities cited in the opinion (pp. 16, 17) apply. But a preliminary question of contract interpretation is *always* for the court, to determine whether the parties did assign a particular issue to non-judicial determination, *Local 659, etc. v. Color Corp., supra,* at 195.

The strongest evidence of a contract's meaning, almost mandatory on a court, is the construction by conduct of the parties, although different from what the words seem to mean to the court, *Crestview Cemetery Ass'n v. Dieden,* 54 C.2d 744, 753, 754. The mutual submission to the court by all parties of the meaning of "fair market value" was *their* construction that by *their* contract *they* did *not* intend that issue for the appraiser. The Trial Court's decision of the issue was his interpretation to the same effect, which, being supported by the parties' own construction, cannot possibly be "clearly erroneous".

## CONCLUSION

We respectfully pray that a rehearing be granted.

Dated: San Francisco, California, September 18, 1963.

Moses Lasky
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I certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Moses Lasky